

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	Criminal No. 03-10370-DPW
SCOTT MYERS,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S MEMORANDUM RE: REVOCATION OF
SUPERVISED RELEASE**

This memorandum is being filed with respect to the issue of whether, at the hearing held on June 23, 2008, there was sufficient evidence on the basis of which the Court can find that defendant violated 18 U.S.C. §3146 as a result of his failure to appear at a final revocation hearing that had been scheduled for May 12, 2008. Although defendant concedes that he was released by Magistrate Judge Collings on condition that he appear for his final revocation hearing and that he failed to appear for that hearing, there was insufficient evidence that defendant had actual notice that he was required to appear on May 12, 2008, and that his failure to appear on that date was willful.

**A. The Evidence Does Not Establish That Defendant Had Notice That He Was
Required To Appear On May 12, 2008.**

One of the elements of a violation of §3146 is that the defendant had actual notice that he was required to appear in court on the date and time in question. See United States v. Stewart, 104 F.3d 1377, 1385 (D.C. Cir. 1997). In the present case, however, it is undisputed that when he was released by the Magistrate Judge on April 9, 2008, defendant was informed that he was

required to appear for the final revocation hearing on April 23, 2008. On April 22, 2008, the hearing was rescheduled from April 23rd to May 12th by an electronic notice published on the court's ECF system. The Probation Officer did not send a written notice of the rescheduling to defendant's address, and there is simply no evidence that defendant actually received any notice of the rescheduled date.

The government argues, however, that "[w]hen a defendant engages in a course of conduct designed to avoid notice of his trial date, the government is not required to prove the defendant's actual knowledge of that date." Weaver v. United States, 37 F.3d 1411, 1412-13 (9th Cir. 1994). It argues that his failure to comply with the requirements of his release that he stay in contact with his probation officer was such a "course of conduct" because his probation officer would have informed him of the rescheduled hearing date. But the evidence did not establish that defendant would have been informed of the changed date even if he had reported to the Probation Office as required. In fact, the probation officer testified that since he had been out of the office between April 23rd and May 12th defendant would not have been able to contact him at all during that period. Furthermore, he was unable to say whether any other probation officer to whom defendant would have reported was aware of the rescheduled hearing date and would have informed defendant of it. The government's position that defendant's failure to contact his probation officer as directed obviated any need for the government to prove that defendant had actual knowledge of the hearing date because he would have received actual notice if he had done so is based on pure speculation.

The other cases relied on by the government are inapposite. In United States v. Fisher, 137 F.3d 1158 (9th Cir. 1998), the court held that the government did not have to prove that the

defendant had actual knowledge of a court date where the defendant had violated the terms of his release by changing his residential address without permission so that he could not receive notice of his required appearance. And in United States v. Martinez, 890 F.2d 1088 (10th Cir. 1989), the court held that the undisputed evidence that the defendant had been mailed notice of his surrender date was sufficient to show that he had notice under the “well settled presumption that notice mailed is notice received.” In the present case, there is no evidence that defendant had changed his residential address or that he would not have received notice of the rescheduled court date if it had been mailed to him at that address.

B. The Evidence Does Not Establish That Defendant’s Failure To Appear Was Willful.

Willfulness is an essential element of a violation of §3146. United States v. Ott, 741 F.2d 226, 228 (8th Cir. 1984). It means that the failure to appear be “committed voluntarily and with the purpose of violating the law, and not by mistake, accident, or in good faith.” United States v. Bourassa, 411 F.2d 69, 74 (10th Cir. 1969). Evidence that the defendant did not appear in court as required and that he was aware of that obligation is, in and of itself, insufficient to prove willfulness. See United States v. Wilson, 631 F.2d 118, 120 (9th Cir. 1980); United States v. Reed, 354 F.Supp. 18, 20 (D. Mo. 1973)(“Violation of the conditions of the bond, standing alone, is not sufficient evidence” to prove willfulness).

In the present case, however, the government relies for proof of willfulness on nothing more than defendant’s failure to appear on May 12th and the violation of certain other conditions of his release, even though there is no evidence that defendant’s compliance with those conditions would have resulted in his being notified of the rescheduled hearing date. The evidence did not establish that defendant was not living at 151 Dorchester Street or that he did

not install a land line at that address. The probation officer testified only that on one occasion the marshals did not find him there, and that defendant failed to produce evidence that he had installed a phone there. Without proof that defendant had actual notice of the date he was required to appear and that he intentionally failed to appear on that date, the government has failed to establish willfulness.

Conclusion

For the foregoing reasons, the government has failed to establish that defendant had actual notice that he was required to appear for a final revocation hearing on May 12, 2008, and that his failure to appear was willful. Accordingly, it has failed to establish that defendant violated 18 U.S.C. §3146.

Respectfully submitted,

s/ Jonathan Shapiro
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Dated: July 10, 2008

Certificate of Service

This is to certify that the foregoing document, filed through the ECF system, has been served electronically on the registered participants on July 10, 2008.

s/ Jonathan Shapiro
Jonathan Shapiro

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